Petition

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ALEXANDER L. STEVAS,
CLERK

81-1278

NO.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

BILLIE DENISE WILLIAMS

PETITIONER

V.

UNITED STATES OF AMERICA

RESPONDENT

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I

WHETHER THE STOP, SEIZURE, SEARCH, AND ARREST OF PETITIONER VIOLATED THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

NO.

IN THE
SUPREME COURT OF THE UNITED STATES
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OPINION BELOW

This case has not been reported by the courts below. The opinion of the United States Court of Appeals for the Sixth Circuit, styled "Order" and filed by that Court on October 29, 1981, is appended to this Petition. Case No. 81-5084. A Petition for Rehearing En Banc was filed and denied on December 11, 1981. A copy of the order is appended to this Petition. A Motion for Stay of Mandate was filed by the Petitioner on December 18, 1981, and has not been acted on at this time. A copy of the Motion is appended to this Petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was set out in the Appendix hereto. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant constitutional and statutory provisions are Amendments Four and Fourteen of the United States Constitution and 21 U.S.C.

§841(a)(1). The provisions are fully set out below.

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT XIV

§1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

21 U.S.C. §841(a)(1)

(a) Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally--

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; ...

STATEMENT OF THE CASE

In April, 1978, Petitioner was confronted

by two large, armed law enforcement officers outside the Memphis Airport, who took her luggage. She was advised to return to the airport security office, which was a small, closet-like office within another small office in the airport. The officers identified themselves as Drug Enforcement agents. Without Miranda warnings, she was asked for her ticket, which turned out to be in a name different from her identification. Her luggage, which had been in the custody of the officers since they had confronted her outside the airport, was searched, and her purse searched, with a pound of cocaine being found in the purse. She was never advised of any right to refuse consent to the search and maintained throughout that she yielded to the obvious and apparent authority displayed by armed and determined law enforcement officers.

The officers claimed to have stopped her because she was arriving from Miami, Florida, and, although she had baggage checked, was alleged to have been seen speaking briefly to a man travelling with a small amount of carry-on

baggage, and allegedly attempting to make out that they did not know one another. Officers claim to have determined that she and the other party, who is not charged, had purchased their tickets in close proximity and that the call back numbers given did not check out, the claim being that they fit provisions of the Drug Courier Profile.

The matter began in the Tennessee state court system, wherein the state trial judge, confronted with this fact circumstance, correctly concluded the evidence seized should have been suppressed. Whereupon, an indictment was returned against this defendant only in the federal system. A motion on suppression was heard in that cause, and the district judge correctly concluded that the evidence should be suppressed. The government appealed to the United States Court of Appeals for the Sixth Circuit, who remanded the matter for further findings of fact. The District Court, upon rehearing, reached an opposite conclusion. Petitioner went to trial without a jury, was

convicted, and has appealed therefrom. The United States Court of Appeals erroneously applied dicta from U.S. v. Mendenhall, 446 U.S. 544 (1980), and sustained the second ruling of the district judge admitting the evidence. A request for an en banc hearing that they consider the matter in light of their recently decided case of U.S. v. Jefferson, 650 F.2d 854 (6th Cir. 1981), was denied. In the interim, this Court has granted certiorari in the case of Royer v. Florida, 389 So.2d 1007 (1981), which is significantly and substantially close in its fact circumstance to both Jefferson and the instant case. Petitioner has filed a motion for stay of mandate with the Clerk of the Court of Appeals for the Sixth Circuit, which was filed December 18, 1981. This has not been acted on, apparently awaiting the filing of this Petition and return by this Court.

Original jurisdiction in the United States District Court was predicated upon the alleged violation by Petitioner of 21 U.S.C. §841(a)(1).

Petitioner seeks review of the ruling of the Court of Appeals for the Sixth Circuit and entry of an order suppressing evidence wrongfully seized from Petitioner.

ARGUMENT

I

THE STOP, ARREST, SEIZURE, AND THE SEARCH OF PETITIONER AND HER BAGS VIOLATED THE UNITED STATES CONSTITUTION.

The facts and circumstances in this case so nearly and closely parallel Royer v. State, 389 So.2d 1007 (Fla. App., 1981), on which this Court has recently granted certiorari, and U.S. v. Jefferson, 650 F.2d 854 (6th Cir., 1981), as to be almost indistinguishable, and whatever results are obtained in those matters, it is submitted, should be applied to Petitioner, Billie Denise Williams.

It is maintained that the basis for the initial stop, detention or arrest, as you will have it, and search were as a result of the Drug Enforcement Agency's Drug Courier Profile. The most cursory examination of the cases dealing with this Drug Courier Profile merely serve

to establish that anything which an officer considers out of the ordinary becomes a portion thereof.

In this matter, it is claimed that the following circumstances fit the alleged Drug Courier Profile:

1. Petitioner and another individual had a brief meeting in the Atlanta airport, separated and appeared not to know each other further.
2. The flight originated in Miami.
3. The call back number left by Petitioner and the person who they claim she was trying to pretend not to know allegedly did not check out; an agent who did not speak Spanish called one of the numbers and found only Spanish-speaking people living there.
4. The person whom she supposedly was pretending not to know had only carry-on luggage, a shoulder bag or hanger sack.

Petitioner and a man who had come to meet her at the airport were stopped by two large,

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armed drug officers as they were leaving the Memphis Airport and walking towards the parking lot. Her luggage was seized at that time. The officers say they requested Petitioner and her companion to accompany them back to the security office; Petitioner and another person who was also stopped advise that they were confronted by an overwhelming display of authority and yielded and acquiesced to that authority. Petitioner was taken to a small, ten or twelve foot square office with a small, three or four foot square office inside of it, where in she was interrogated by three male agents, one of whom had a gun visible to her. Petitioner, when brought in for interrogation, was asked for her ticket and identification and was never given a Miranda warning, pursuant to this Court's holding in Miranda v. Arizona, 384 U.S. 436 (1966). Officers claim they asked for permission to search; Petitioner's version is that they told her to open her suitcase, which they had seized on the parking lot, and her purse. She did not quarrel about the suitcase, but attempted to

dissuade them from searching her purse by advising that she had sanitary napkins therein. Petitioner was never advised of her right to refuse to consent, a factor considered especially significant by this Court in the Mendenhall decision. No consent to search form was signed, tendered or in evidence. The officers had such forms available. Petitioner is a small, relatively young black lady, with no great education, who is a widow with two small children.

The officers claim that Petitioner consented to the search of her purse, wherein the contraband was found. The trial judge initially concluded that she was under arrest and in custody, within the meaning of that term, once she was in the airport security office and certainly once she was back in the little cubbyhole wherein she was interrogated and the search took place. The Florida court in Royer correctly concluded that no voluntary consent could be had under those circumstances.

Comparing this matter with Royer, it is abundantly clear that, while Petitioner did not

physically attempt to prevent the search of her purse, she was involuntarily restrained in this small interrogation room in a small, enclosed area confronted by three armed officers who were much larger and who had indicated they intended to search her irregardless. She was advised that she was a drug suspect. Her plane ticket was taken from her, and she was questioned without benefit of a Miranda warning. Her luggage had been taken from her outside the airport and was retained by the officers throughout. Petitioner testified that she was under the belief that she was not free to leave, and the officers so confirmed that had she or the others attempted to leave they would have prevented it.

It is submitted that the facts in Royer are similar and substantially close enough to warrant this Court correcting the errors of the lower court in this cause.

Again, comparing this to the United States Sixth Circuit Court of Appeals case of U.S. v. Jefferson, supra, wherein that Court determined that, as in this case, wnen Paul Markonni stopped

Jefferson and identified himself as a DEA agent, and requested that Jefferson accompany him to the baggage claims office, a seizure within the meaning of the Fourth Amendment had occurred.

Again, viewing the matter in the perspective of this Court's opinion in Reid v. Georgia, 100 S.Ct. 2752 (1980), this Court clearly held that there must be a sufficient and articulable basis to have reasonably concluded the Petitioner was engaged in criminal activity in order to have a legitimate basis for stopping, interrogating or seizing her.

The only contrary authority existing in this Court is certain statements of dicta by individual or small groups of members of this Court in their various opinions in U.S. v. Mendenhall, 446 U.S. 544 (1980), which, in light of the lack of plurality and definitive holdings on the material aspects therein, seems hardly a precedent by which lower courts could or should be bound.

Counsel is unaware as to the reasons which cause this Court to grant certiorari in the

Florida case of Royer v. State, supra. However, whatever reason it may be, the facts of the instant case, it is submitted, are substantially similar enough in this matter as to create a compelling cause for review by this Court.

It is submitted that the well reasoned, carefully balanced judicial opinion of Judge Schwartz of the Florida Court of Appeals in Royer would be the proper guide for the determination of this continuing problem by this Honorable Court.

It is accordingly prayed that this Honorable Court reach the following conclusions, which we submit the law and the facts require:

1. That the detention of Billie Denise Williams was not based on probable cause or reasonably founded suspicion of existing criminal activity;
2. That once her luggage was taken from her outside the airport and she was advised that they were drug agents and she was under suspicion, she was "in custody";

3. That the inquiry as to her ticket and identity should not have been considered for any purpose when no warning of rights was given, in violation of the Miranda rule;

4. That the facts and circumstances considered individually and as a whole show that no free, voluntary and informed consent was or could have been given by the Petitioner.

Respectfully submitted,

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Appendix

APPENDIX

No. 81-5084

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

United States of America :

Plaintiff-Appellee :

v. : ORDER

Billie Denise Williams :

Defendant-Appellant :

Before EDWARDS, WEICK and KEITH, Circuit Judges.

Upon consideration of the briefs, record and arguments of counsel, we are of the opinion that the judgment of the district court, who heard the airport drug criminal case at bench trial, a jury having been waived, was supported by abundant evidence; that the district court did not err in denying the defendant's motion to suppress evidence and it had the right, in its discretion, which was not abused, to consider the defendant's lack of cooperation in

determining the sentence which it imposed. This appeal is governed by the decision of the Supreme Court in United States v. Mendenhall, 446 U. S. 544 (1980).

The judgment of the district court is therefore affirmed.

ENTERED BY ORDER OF THE COURT

/s/
Clerk

No. 81-5084

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

United States of America :

Plaintiff-Appellee :

v. : O R D E R

Billie Denise Williams :

Defendant-Appellant :

Before EDWARDS, WEICK and KEITH, Circuit Judges.

No judge in regular active service of the court having requested a vote on the suggestion

for a rehearing en banc, the petition for rehearing filed herein by the defendant-appellant has been referred to the panel which heard the original appeal. Upon consideration of said petition, the court finding no issues presented which have not been previously considered,

IT IS ORDERED that the petition for rehearing en banc be and it is hereby denied.

ENTERED BY ORDER OF THE COURT

/s/ _____
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VS.

BILLIE DENISE WILLIAMS,

Defendant-Appellant.

NO. 81-5084
District Court
NO. 79-20005

MOTION TO STAY MANDATE
PENDING APPLICATION FOR CERTIORARI

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT:

COMES NOW Defendant-Appellant, through counsel, who would respectfully move this Court for entry of an order staying the mandate in this cause, in order to allow the Defendant to remain free on the present bond pending the filing and, we trust, hearing on a Petition for Writ of Certiorari, to review an Opinion of this Court, by which Appellant is aggrieved, entered December 11, 1981.

Appellant would respectfully pray that this Honorable Court grant an additional thirty (30) days stay of the issuance of the mandate, pursuant to the authority of Rule 41(b) of the Federal Rules of Appellate Procedure. Appellant respectfully would further move that, upon the timely filing of the Petition for Writ of Certiorari to the United States Supreme Court, and notification to the Clerk of this Court, the mandate be stayed pending disposition of the matter in that Court.

Respectfully submitted,

/s/
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CERTIFICATE OF SERVICE

I, JAY FRED FRIEDMAN, hereby certify that a copy of the foregoing Motion to Stay Mandate Pending Application for Certiorari has been served upon Mr. Timothy R. DiScenza, Assistant United States Attorney, 10th Floor, Federal Office Building, 167 North Main, Memphis, Tennessee, 38103, this the (16th) day of December, 1981.

/s/
JAY FRED FRIEDMAN

Opposition

Supreme Court, U.S.
FILED
APR 6 1982
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No. 81-1278

In the Supreme Court of the United States

OCTOBER TERM, 1981

BILLIE DENISE WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner was seized within the meaning of the Fourth Amendment when DEA agents approached her in an airport parking lot and requested that she accompany them back inside the airport terminal.

2. Whether that encounter, if adjudged a seizure, was justified by reasonable suspicion of criminal activity.

3. Whether petitioner's consent to the search of her purse was voluntary.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1278

BILLIE DENISE WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment order of the court of appeals (Pet. App.) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 29, 1981. A petition for rehearing was denied on December 11, 1981. The petition for a writ of certiorari was filed on January 7, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a non-jury trial in the United States District Court for the Western District of Tennessee, petitioner was convicted of possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841 (a)(1). She was sentenced to four years' imprisonment. The court of appeals affirmed (Pet. App.).

1. The evidence at trial showed the following. At 3:00 p.m. on April 13, 1978, at Atlanta International Airport, DEA Agents Terry Mathewson and Paul Markonni observed Michael David Henderson disembark from a Delta Airlines flight that had arrived from Miami, Florida (Tr. 21-22, 43).[1] Henderson, who was carrying a tote bag, approached a Delta ticket agent, displayed his ticket folder, and requested directions to the departure gate for a flight to Memphis, Tennessee (Tr. 22, 44). The agents noticed that no baggage claims stubs were attached to Henderson's ticket envelope (Tr. 22, 24, 44-45). Henderson was directed to Gate 71 in an adjacent concourse for the connecting flight to Memphis (Tr. 24, 45).

After all the passengers on the flight from Miami had left the plane, Agents Mathewson and Markonni proceeded to Gate 71 (Tr. 24, 45). Discovering that Henderson had not yet checked in, they provided the Delta gate agent with a description of Henderson and requested that he examine Henderson's ticket to determine whether Henderson had checkd any luggage (Tr. 24, 45).

Agent Mathewson returned to Gate 71 shortly before 4:00 p.m. He saw Henderson, who was not carrying his tote bag, enter the gate area and sit down

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[1] "Tr." refers to the transcript of the November 25, 1980, bench trial.

next to petitioner. Agent Mathewson observed that Henderson's bag was on the floor next to petitioner (Tr. 25). Petitioner conversed briefly with Henderson before boarding the flight to Memphis. Henderson then checked in at the gate and boarded the same flight (Tr. 25, 35). Agent Mathewson checked Henderson's ticket and discovered that it had been issued to "David Henderson" and had been paid for in cash (Tr. 26, 45-46).

Shortly after Mathewson relayed this information to Markonni, the Delta agent paged Markonni and requested that he return to Gate 71 (Tr. 46). The agent informed Markonni that petitioner had first boarded the flight without checking in and had then been required to return to the gate to check in and to receive a boarding pass. The ticket petitioner surrendered upon checking in had been issued in the name of "Romelle Hampton" by the same Miami ticket agent who had issued Henderson's ticket (*ibid.*). The ticket also showed that petitioner had arrived in Atlanta on the same flight as Henderson (Tr. 46-47).

Markonni then checked the Delta reservations computer and discovered that the reservations for "Hampton" and Henderson had been made within three minutes of each other. He also discovered that two very similar telephone numbers had been provided to the airline for the purpose of contacting the ticketholders (Tr. 47-48). Markonni called both numbers. He discovered that the number provided by Henderson was not a working number and that the number given by petitioner was that of a Spanish-speaking family who did not know Henderson or "Hampton" (Tr. 48). Believing that Henderson and "Hampton" were drug couriers, Markonni relayed the information to DEA agents in Memphis and advised them that petitioner

and Henderson would be arriving in Memphis at approximately 4:20 p.m. (Tr. 48-49, 64-67, 92-94; S.H. 12-13, 15, 20, 26).[2]

In Memphis, DEA agents H. L. Lawrence and Robert Fletcher, together with two local narcotics agents, watched as petitioner's flight arrived and the passengers disembarked (Tr. 92-97). Petitioner and Henderson left the plane separately and proceeded separately to the baggage area (Tr. 97; S.H. 18). Henderson immediately left the baggage area, and the local narcotics agents followed him outside (S.H. 18). Petitioner claimed her baggage and was joined by another companion, later identified as John Tripp, who helped her carry the luggage out of the airport (Tr. 98; S.H. 18-19). Although Tripp had been present in the baggage claim area the entire time petitioner was waiting for her luggage to arrive (approximately 8 to 12 minutes), he made no attempt to join her until she had claimed her suitcase (Tr. 98). After Tripp and petitioner had entered the airport parking lot, the DEA agents approached them and identified themselves (Tr. 98-99; S.H. 19). They requested that petitioner and Tripp accompany them back to the airport area, and the pair expressly agreed to do so (Tr. 99, 140-141; S.H. 19). As they were walking back to the airport security area, they met the two local agents accompanied by Henderson (S.H. 20).

Inside the airport security office, the agents asked the three for identification and asked petitioner and Henderson for their airline tickets (Tr. 99; S.H. 20). Tripp had no identification (Tr. 99-100; S.H. 20). Although petitioner's airline ticket was made out in

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[2] "S.H." refers to the transcript of March 16, 1979, Motion to Suppress.

the name of "Romelle Hampton," her other identification bore the name of Billie Denise Williams (Tr. 100, 104, 108; S.H. 20). The agents asked petitioner which was her real name. They also asked her why she had come to Memphis and whether she knew Henderson (S.H. 21, 34). Petitioner gave no answers to any of these questions (*ibid.*).

The agents then informed petitioner that they suspected she was carrying narcotics and asked if they could search her luggage (Tr. 180-181; S.H. 21). Without hesitation, petitioner told them to "go ahead" and stated that she didn't mind" (Tr. 108; S.H. 21-22, 35). Finding no contraband in the suitcase, one of the local agents asked petitioner if he could look in her purse (Tr. 108; S.H. 22, 35). Petitioner replied, "sure." She said that he was welcome to look in the purse but that its only contents were some sanitary napkins (Tr. 108-109; S.H. 22). The agent replied that it did not bother him and that he had seen them before (Tr. 109; S.H. 22, 35). Petitioner then said "here is the purse," and she handed it to the agent (Tr. 109; S.H. 35). Inside the purse, the agents found a package containing one pound of cocaine (Tr. 109; S.H. 22).[3]

2. The State of Tennessee charged petitioner with possession of cocaine with intent to distribute it. The state court judge granted petitioner's motion to suppress the evidence on the ground that petitioner's arrest and the agents' seizure of the contraband were

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[3] Petitioner related a different version of these events at the suppression hearing. She testified (S.H. 64-65) that when the agents approached her, they ordered her to accompany them to the security office. She said that she felt she had no choice but to comply (*ibid.*). She also testified (*id.* at 67) that she did not voluntarily permit the agent to search her purse.

unconstitutional. The instant federal indictment was then brought. Following an evidentiary hearing, the district court granted petitioner's motion to suppress. Although the court found that the case resembled *United States* v. *Smith*, 574 F.2d 882 (1978), in which the Sixth Circuit had upheld a similar search and seizure, the district court held that the scales were tipped by the contrary finding of the state court.

The court of appeals reversed and remanded the case to the district court for further factual findings. The district court then made additional findings and denied the motion to suppress.[4] The court found that petitioner had not been seized within the meaning of the Fourth Amendment when the agents approached her in the parking lot and requested her to return to the airport (C.A. App. 43-44; Tr. 196-198, 216, 219, 224-225, 227); that even if petitioner had been "seized" at that point, the agents had sufficient reasonable suspicion to justify the seizure (C.A. App. 44; Tr. 197, 217-218, 219, 222-223, 224); that petitioner had acted voluntarily when she accompanied the agents to the office and answered their questions (C.A. App. 44-45; Tr. 198; 201, 224-225, 227); that petitioner had not been "seized" until the agents advised her that they suspected she was carrying narcotics (Tr. 229); and that petitioner had not objected to the

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[4] On remand, the court made additional factual findings based on the facts adduced at the original hearing on the motion to suppress. Based on these findings, it denied the motion to suppress (C.A. App. 43-46). Thereafter, based on the evidence adduced at petitioner's bench trial, the district court made further findings (Tr. 191-204; 212-232) and reaffirmed its earlier denial of the motion (Tr. 187, 232). ("C.A. App." refers to the joint appendix filed by petitioner and the government in the court of appeals.)

search of either her luggage or her purse (C.A. App. 45; Tr. 202-203, 226-227).[5] Petitioner was thereafter convicted as charged, and the court of appeals affirmed her conviction (Pet. App.), holding that the

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[5] The district court's finding on the consent issue is somewhat unclear. In denying the motion to suppress, the court stated (C.A. App. 45):

> [Petitioner] did not withhold her consent, nor make objection to, the search of her luggage or of her purse. At the same time, she was, of course, for reasons we now know by benefit of hindsight, reluctant about the search of her purse and did not expressly agree before the agent proceeded to take possession of it and look inside without objection.
>
> * * *
>
> [Petitioner] consented at least to handing over the purse to the officers when requested, but her freedom to leave was restrained at this point.

At the conclusion of the bench trial, the district court further stated (Tr. 203, 226-227):

> Now we find that the facts indicate that there was some ambivalence with regard to handing over the purse. The defendant was obviously not happy about the prospect in not wanting to turn over her purse, her brief case, if you will, because she knew what was in it. And it just, it is just very plain that any person in that situation would not be looking forward to the prospect of turning over something that would doubtless be incriminating as far as she was concerned.
>
> But we find that she did hand over the purse when requested to do that.
>
> * * * * *
>
> We find that the defendant did not object to the search of her luggage nor to the search of the valise or purse, but the real difficult question here is what acquiescence under the circumstances is akin to consent, and that is a very difficult question as far as the Court is concerned in the circumstances of this case.

legality of the agents' actions was governed by *United States* v. *Mendenhall*, 446 U.S. 544 (1980).

ARGUMENT

1. Petitioner contends (Pet. 10-11) that her initial encounter with the agents in the airport parking lot constituted a "seizure" for purposes of the Fourth Amendment. While this contention raises an important Fourth Amendment issue, the lower courts correctly held that the encounter was not a seizure, and there is no need for this Court to consider the question in this case.

a. This Court has recognized that not every contact between a citizen and a police officer constitutes a seizure within the meaning of the Fourth Amendment. On the contrary, "[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen [does] a 'seizure' [occur]." *Terry* v. *Ohio*, 392 U.S. 1, 19 n.16 (1968); see also *id.* at 32-33 (Harlan, J., concurring); *id.* at 34 (White, J., concurring); *Sibron* v. *New York*, 392 U.S. 40, 63 (1968). As Justice Stewart, joined by Justice Rehnquist, explained in *United States* v. *Mendenhall*, 446 U.S. 544, 554-555 (1980) (footnotes omitted):

> [A] person has been "seized" within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use

> of language or tone of voice indicating that compliance with the officer's request might be compelled. * * * In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person.

In *Mendenhall*, a majority of the Court found it unnecessary to decide whether a citizen-police contact constitutes a seizure within the meaning of the Fourth Amendment in the absence of police conduct that would cause a reasonable person to believe that he was not free to leave. See 446 U.S. at 560 (Opinion of Powell, J.); 446 U.S. at 568-571 (White, J., dissenting). However, the courts of appeals have uniformly adopted the standard endorsed by Justices Stewart and Rehnquist for determining whether a seizure has taken place. See *United States* v. *Berry*, Nos. 79-5471, 79-5472 (5th Cir. Mar. 19, 1982) (en banc), slip op. 14790-14791; *United States* v. *Setzer*, 654 F.2d 354 (5th Cir. 1981); *United States* v. *West*, 651 F.2d 71, 72 (1st Cir. 1981), petition for cert. pending, No. 81-307 (filed Aug. 14, 1981); *United States* v. *Patino*, 649 F.2d 724, 726, 727 (9th Cir. 1981); *United States* v. *Elmore*, 595 F.2d 1036 (5th Cir. 1979), cert. denied, 447 U.S. 910 (1980); *Cuevas-Ortega* v. *INS*, 588 F.2d 1274, 1277 (9th Cir. 1979); *United States* v. *Wylie*, 569 F.2d 62, 68 (D.C. Cir. 1977), cert. denied, 435 U.S. 944 (1978); see also *United States* v. *Harrison*, No. 81-5042 (4th Cir. Jan. 7, 1982), slip op. 5-6; *United States* v. *Price*, 599 F.2d 494, 498 (2d Cir. 1979); *State* v. *Reid*, 247 Ga. 445, 276 S.E. 2d 617, 621 (Ga.), cert. denied, No. 81-180 (Oct. 5, 1981), on remand from 448 U.S. 438 (1980).

Petitioner contends (Pet. 10) that the decision below conflicts with the same court's earlier decision in

United States v. *Jefferson*, 650 F.2d 854 (6th Cir. 1981). There, a DEA agent stopped two suspects as they were leaving the airport terminal. The agent identified himself and requested that the suspects accompany him to the baggage claim office. Holding that the suspects had been "seized," the Court distinguished *Mendenhall* by stating (650 F.2d at 856):

> In this case agent Markonni did not merely stop Jefferson to ask him a few questions; he stopped him and immediately after identifying himself as a DEA agent requested Jefferson to accompany him to the baggage claims office. In these circumstances, Jefferson could not reasonably believe that he was free to leave.

Petitioner's claim of a conflict between two Sixth Circuit decisions is a matter for that court to resolve. *Wisniewski* v. *United States*, 353 U.S. 901 (1957) (per curiam). Moreover, no other circuit has held that a request by an officer that a suspect accompany him to a nearby office necessarily constitutes a seizure,[6] and such a per se rule, in our view, would

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[6] There is no conflict between the decision in this case and the recent en banc decision in *United States* v. *Berry*, *supra*. In *Berry*, suspects approached by DEA agents in the airport terminal first agreed to accompany the agents to the airport security office and subsequently consented to a search of their luggage, which was found to contain illegal drugs. The Fifth Circuit held that the search did not violate the Fourth Amendment; therefore, the decision in *Berry* does not conflict with the decision here. There is dictum in the opinion, however, stating (slip op. 14794) that "only exceptionally clear evidence of consent should overcome a presumption that a person requested to accompany an agent to an office no longer would feel free to leave" and had therefore been seized. The court added (*ibid.*): "Silently following an officer would rarely constitute sufficient evidence of consent under any circum-

clearly be unjustified. Indeed, in *Sibron* v. *New York*, *supra*, 392 U.S. at 63, the Court suggested that the determination whether Sibron was "seized" when an officer approached him in a restaurant and told him to come outside depended upon whether "Sibron accompanied [the officer] * * * voluntarily in a spirit of apparent cooperation with the officer's investigation," rather than in submission to a "show of force or authority which left him no choice."

b. In this case, the district court correctly determined that petitioner had not been seized in the airport parking lot. Here, as in *Mendenhall*, nothing about the agents' conduct would have led a reasonable person in petitioner's position to believe that he was not free to leave. There was no show of force or authority when the agents requested that petitioner and Tripp accompany them inside. Unlike the officer in *Terry* v. *Ohio*, *supra*, 392 U.S. at 7, the agents did not physically seize petitioner or Tripp. Rather, they courteously asked if petitioner and Tripp would accompany them back inside, and they displayed no weapons.[7] The district court found (Tr. 216-217, 219, 220) that the agents' initial approach was less threatening than that in *Mendenhall*. In addition, the court found that petitioner was "older and more mature"

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stances." Here, petitioner expressly agreed to accompany the officers to the security office (Tr. 99, 140-141; S.H. 19). Whether the *Berry* court would find "exceptionally clear evidence of consent," however, is unclear.

[7] There is no support in the record for petitioner's contention (Pet. 8) that the gun of one of the agents was visible when she was questioned inside the airport office (see Tr. 130-131; S.H. 24). Moreover, that contention is contrary to the district court's explicit finding (Tr. 217, 226) that as no time was there any display of weapons.

than Mendenhall and was thus "fully capable of giving a voluntary consent when contacted by law enforcement people for purposes of investigation and inquiry" (Tr. 217). In short, petitioner cannot point to anything the agents did or said that could have reasonably led her to believe that she and Tripp were not free to go.[8]

2. Even if the agents had "seized" petitioner in the parking lot, that would not require suppression of the cocaine. As the district court found (Tr. 197), the agents had sufficient reasonable suspicion to support an investigatory stop. At that time, the agents knew that petitioner and Henderson had boarded a plane in Miami, Florida, a center for drug activity; that they had purchased their tickets for cash, from the same ticket agent, and at approximately the same time; that they had pretended not to know each other although in fact they were traveling together; that they had both given similar false telephone numbers to the airlines; that petitioner's companion was traveling with no luggage other than a tote bag; and that the individual who met petitioner and helped to retrieve her luggage at the Memphis airport had made

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[8] The decision in this case does not conflict with *United States* v. *Patino*, 649 F.2d 724 (9th Cir. 1981), where a seizure was held to have occurred. First, the court in *Patino* employed the "clearly erroneous" test in affirming the district court's finding that a seizure had taken place (*id.* at 729 n.4). The court distinguished cases, like this one, in which the district found that there was no seizure. Second, the *Patino* court relied heavily on factors not present here, *viz.*, the court's belief that the defendant was not fluent in English and its belief that because "she was an alien she may have felt a greater compulsion to abide by the request of the police" (*id.* at 727). While we believe *Patino* was wrongly decided, it does not conflict with the decision here.

no attempt to join her in the baggage claim area until after her luggage had arrived. Based upon these facts, upon which the agents relied, the district court properly found that if a "seizure" occurred, it was justified by reasonable suspicion.[9]

Despite petitioner's assertion to the contrary (Pet. 11), *Reid* v. *Georgia*, 448 U.S. 438 (1980), does not compel a different result. There, two individuals were stopped because they had arrived on an early morning flight from a city known as a source of cocaine; they had no luggage other than shoulder bags; and they appeared to be trying to conceal the fact that they were traveling together (*id.* at 441). The Court held that those facts were insufficient to establish reasonable suspicion. 448 U.S. at 441; *id.* at 442 n.2 (Powell, J., concurring); see also *United States* v. *Mendenhall*, *supra*, 446 U.S. at 565 n.6) (Opinion of Powell, J.). The facts in the present case are, however, far more substantial.[10] The lower courts' conclusion that those facts established reasonable suspicion to stop petitioner does not warrant further review at this time.

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[9] Petitioner suggests (Pet. 6-7) that the agents' reliance upon the DEA "drug courier profile" demonstrates that reasonable suspicion was lacking because that profile, in petitioner's view, includes "anything which an officer considers out of the ordinary." However, questions concerning the validity of the drug courier profile are not at issue here. The district court examined all the relevant facts and circumstances and did not attach any special significance to the drug courier profile. See *United States* v. *Mendenhall*, *supra*, 446 U.S. at 565 n.6 (Powell, J., concurring).

[10] The district court found (Tr. 217-218) that the agents here had a higher level of suspicion to justify a stop than did the agents in *Mendenhall*.

3. Petitioner also maintains (Pet. 9-10, 13) that the government failed to establish that she voluntarily consented to the search of her purse. The record, however, is clearly sufficient to support a finding of consent.[11] When the agents requested permission to search her suitcase, petitioner consented without hesitation. When no contraband was found in the suitcase, an agent asked for permission to search her purse. Petitioner stated that the agent was "welcome" to look in her purse but that it contained nothing except sanitary napkins. When the agent replied that he had seen sanitary napkins before and that the sight did not bother him, petitioner handed him the purse, stating "here is the purse."

Because petitioner's consent to search was not preceded by an impermissible seizure of her person, there is no issue whether the consent was a fruit of an antecedent Fourth Amendment violation. This issue involves only the voluntariness of her consent, to be determined under the standard set forth in *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973). Under that standard, it is necessary to assess the totality of the surrounding circumstances including the characteristics of the accused and the details of the interrogation (412 U.S. at 226).

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[11] Although the district court accepted the agents' version of events, it did not decide whether those facts proved voluntary consent. The court of appeals, however, implicitly held that the facts established voluntary consent, because it held that this case was governed by *United States* v. *Mendenhall*, *supra*. There, under highly similar circumstances, this Court held that the defendant's consent to the search of her person was voluntary. Appellate courts can properly determine whether facts found by the trial court establish that consent to search was voluntarily given. *United States* v. *Mendenhall*, *supra*, 446 U.S. at 551 n.5 (Opinion of Stewart, J.).

The facts here show that no threat, promises, or other forms of coercion were used to obtain petitioner's consent. The agents did not draw or exhibit their weapons at any time. The length of time from the moment the agents approached petitioner until she consented to the search was relatively brief—no more than 20 minutes (State S.H. 28, 74).[12] Petitioner was 24 years old at the time, and she was a high school graduate (State S.H. 136). Moreover, petitioner had been arrested before and thus was no stranger to law enforcement techniques (State S.H. 14).[13] The absence of proof that petitioner knew she could withhold her consent, although a relevant factor, should not be given controlling weight.[14] The agent's

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[12] "State S.H." refers to the transcript of the Oct. 9, 1978, hearing in state court on petitioner's motion to suppress. The transcript of this hearing was before the district court at the federal suppression hearing.

[13] The fact that petitioner gave her consent while in the airport security office is not determinative of the validity of her consent, since she was not in custody at the time. Moreover, even those in custody may voluntarily consent to a search. See *United States* v. *Watson*, 423 U.S. 411, 424 (1976). Custody alone is not enough to demonstrate a coerced consent to search (*ibid.*).

[14] Petitioner claims (Pet. 8, 10, 13) that the agents should have given her Miranda warnings before questioning her in the airport office. Her contention is without merit. As the district court found, petitioner voluntarily agreed to accompany the agents to the office and to answer their questions. She therefore was not in custody. Furthermore, even if petitioner was subject to a *Terry* seizure at that time, brief investigatory questioning of this sort need not be preceded by *Miranda* warnings. *United States* v. *Collom*, 614 F.2d 624, 628 (9th Cir.), cert. denied, 446 U.S. 923 (1980); *United States* v. *Jimenez*, 602 F.2d 139, 144 (7th Cir. 1979); *United States* v. *Stout*, 599 F.2d 866, 868 (8th Cir.), cert. denied,

comment to petitioner that he had seen sanitary napkins before and that they did not bother him was a perfectly legitimate reply to a statement made by petitioner and certainly did not constitute a threat or coercion of any kind.[15] Under all these circumstances, it cannot be said that petitioner's will was " 'overborne' " or that her consent was not her own " 'free and unconstrained choice.' " *United States* v. *Watson*, 423 U.S. 411, 424 (1976), quoting *Schneckloth* v. *Bustamonte*, *supra*, 412 U.S. at 225. Thus, the record amply establishes that petitioner voluntarily consented to the search of her purse.

4. This petition should not be held pending this Court's decision in *Florida* v. *Royer*, cert. granted, No. 80-2146 (Nov. 30, 1981). In that case, the District Court of Appeal of Florida held that a suspect who had agreed to accompany police officers to an airport security office was arrested because he "was 'under [the] reasonable impression that he was not free to leave * * *' " (Pet. Supp. App. 49). The court then held that the arrest was not supported by proba-

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444 U.S. 877 (1979); *Borodine* v. *Douzanis*, 592 F.2d 1202, 1208 (1st Cir. 1979); *United States* v. *Hickman*, 523 F.2d 323, 326-327 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976).

[15] Petitioner claims (Pet. 10) that the agents indicated to her that they intended to search her whether or not she gave her consent. However, that claim finds no support in the record. Petitioner also argues (*ibid.*) that the circumstances were so coercive as to preclude voluntary consent because the agents had taken her plane ticket from her. The record is silent, however, as to whether the agents returned petitioner's ticket to her after examining it. In any event, the retention of petitioner's ticket would not have been coercive because it was simply a used stub and not a ticket needed either for a connecting flight or for a later flight (Tr. 22, 104-104).

ble cause and that a subsequent consensual search of the suspect's luggage was accordingly tainted. As we argue in our brief in that case as amicus curiae (Br. 9-18), the court's decision was wrong because it applied the wrong standard for determining whether an arrest took place. Whether "a reasonable person would have believed that he was not free to leave" is the test suggested in *Mendenhall* by Justices Stewart and Rehnquist for determining whether there has been any "seizure" within the meaning of the Fourth Amendment (446 U.S. at 554-555). It is not the test for determining whether there has been a full-blown arrest. If the Court agrees that there was no arrest in *Royer* prior to the consensual search of the suspect's luggage, it may reverse the decision of the lower court and remand without addressing any of the issues presented by the instant case. In any event, this petition should not be held pending the decision in *Royer*. In *United States* v. *Sanford*, 658 F.2d 342 (5th Cir. 1981), cert. denied, No. 81-5852 (Mar. 1, 1982), which involved similar facts and presented essentially the same issues as the present case, certiorari was recently denied without awaiting the decision in *Royer*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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